

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

MELVIN LEE MORRIS, SR.,

Petitioner,

vs.

MATTHEW KRAMER, Warden,

Respondent.

No. C 08-1579 PJH (PR)

**ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS AND DENYING
CERTIFICATE OF
APPEALABILITY**

This is a habeas corpus case filed pro se by a state prisoner pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the writ should not be granted. Respondent has filed an answer and a memorandum of points and authorities in support of it, and has lodged exhibits with the court. Petitioner has responded with a traverse. For the reasons set out below, the petition is denied.

BACKGROUND

The following is taken from the opinion of the California Court of Appeal on petitioner's direct appeal from revocation of his probation:

In the year 2000, Morris entered a negotiated plea of no contest to the offense of transporting a controlled substance (Health & Saf.Code, § 11352, subd. (a)) and admitted two prior convictions. The trial court suspended imposition of sentence and placed him on five years' probation with, inter alia, the standard obey-all-laws condition.

On October 1, 2004, a complaint and petition to revoke probation were filed, alleging the commission of six new offenses on September 29. [FN1. The documents are file-stamped September 1, but dated October 1, which would appear to be the correct date, given that they allege offenses committed on September 29.] At the preliminary hearing, the trial court announced that Morris's probation revocation hearing would "go on the same date" as the trial. Three of the six counts were dismissed during trial. A jury found Morris guilty of unlawful use of a license (Veh.Code, § 14610, subd. (a)(1)) and not guilty on the two remaining counts.

1 After excusing the jurors, the trial court announced "further proceedings on
2 the probation violation petition." When asked if, in regard to that matter, there
3 was "[a]nything further from the defense," counsel replied that he was
4 "assuming" the trial court was going to find Morris in violation. After
discussion about a sentencing date, the trial court asked, "Was there anything
further in terms of evidence or argument on the probation violation?" to which
defense counsel answered, "No."

5 The trial court then stated that the probation violation hearing was held at the
6 same time as the jury trial. It found that Morris had violated the Vehicle Code,
7 as found by the jury. It further found, by a preponderance of the evidence
(*People v. Rodriguez* (1990) 51 Cal.3d 437, 442), that he violated Penal Code
8 sections 530 .5, subdivision (d) (fraudulent possession of personal
information) as alleged in count 5, of which the jury found him not guilty, and
9 12021, subdivision (a)(1) (possession of firearm by felon-priors) as alleged in
10 dismissed count 1. Finally, the court found Morris in violation of a probation
condition imposed after a previous revocation petition that he not possess
anyone else's identification. Probation was revoked, and Morris was
sentenced to 10 years in prison. Morris filed a timely notice of appeal.

11 *People v. Morris*, 2007 WL 2171467, *1 (Cal. App. 2007).

12 The revocation of petitioner's probation was affirmed by the court of appeal and the
13 supreme court denied review. Petitioner also has filed state habeas petitions, all of which
14 were denied.

15 In its initial review order, this court dismissed the petition with leave to amend,
16 saying that it was not possible to determine what issues petitioner wished to raise.
17 Petitioner amended. The court, reviewing the amended petition, dismissed his second
18 issue, having to do with bail, and issued an order to show cause on his claim that his
19 lawyer was ineffective in failing to investigate and present the facts supporting petitioner's
20 argument that he was not on probation when picked up.

21 STANDARD OF REVIEW

22 A district court may not grant a petition challenging a state conviction or sentence on
23 the basis of a claim that was reviewed on the merits in state court unless the state court's
24 adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an
25 unreasonable application of, clearly established Federal law, as determined by the
26 Supreme Court of the United States; or (2) resulted in a decision that was based on an
27 unreasonable determination of the facts in light of the evidence presented in the State court
28 proceeding." 28 U.S.C. § 2254(d). The first prong applies both to questions of law and to

1 mixed questions of law and fact, *Williams (Terry) v. Taylor*, 529 U.S. 362, 407-09 (2000),
 2 while the second prong applies to decisions based on factual determinations, *Miller-El v.*
 3 *Cockrell*, 537 U.S. 322, 340 (2003).

4 A state court decision is “contrary to” Supreme Court authority, that is, falls under the
 5 first clause of § 2254(d)(1), only if “the state court arrives at a conclusion opposite to that
 6 reached by [the Supreme] Court on a question of law or if the state court decides a case
 7 differently than [the Supreme] Court has on a set of materially indistinguishable facts.”
 8 *Williams (Terry)*, 529 U.S. at 412-13. A state court decision is an “unreasonable application
 9 of” Supreme Court authority, falling under the second clause of § 2254(d)(1), if it correctly
 10 identifies the governing legal principle from the Supreme Court’s decisions but
 11 “unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* at 413. The
 12 federal court on habeas review may not issue the writ “simply because that court concludes
 13 in its independent judgment that the relevant state-court decision applied clearly
 14 established federal law erroneously or incorrectly.” *Id.* at 411. Rather, the application must
 15 be “objectively unreasonable” to support granting the writ. *Id.* at 409.

16 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual
 17 determination will not be overturned on factual grounds unless objectively unreasonable in
 18 light of the evidence presented in the state-court proceeding.” *Miller-El*, 537 U.S. 322 at
 19 340; *see also Torres v. Prunty*, 223 F.3d 1103, 1107 (9th Cir. 2000).

20 When there is no reasoned opinion from the highest state court to consider the
 21 petitioner’s claims, the court looks to the last reasoned opinion. *See Ylst v. Nunnemaker*,
 22 501 U.S. 797, 801-06 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th
 23 Cir.2000).

24 DISCUSSION

25 Petitioner contends that his counsel should have investigated his claim that he was
 26 not on probation when he was arrested, and should have made that argument to the court.

27 I. Standard

28 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the

1 Sixth Amendment right to counsel, which guarantees not only assistance, but effective
2 assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order to
3 prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner must establish
4 that counsel's performance was deficient, i.e., that it fell below an "objective standard of
5 reasonableness" under prevailing professional norms. *Id.* at 687-88. Second, he must
6 establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a
7 reasonable probability that, but for counsel's unprofessional errors, the result of the
8 proceeding would have been different." *Id.* at 694. A reasonable probability is a probability
9 sufficient to undermine confidence in the outcome. *Id.*

10 It is unnecessary for a federal court considering a habeas ineffective assistance
11 claim to address the prejudice prong of the *Strickland* test if the petitioner cannot even
12 establish incompetence under the first prong. *Siripongs v. Calderon*, 133 F.3d 732, 737
13 (9th Cir. 1998). Similarly, a court need not determine whether counsel's performance was
14 deficient before examining the prejudice suffered by the defendant as the result of the
15 alleged deficiencies. *Strickland*, 466 U.S. at 697.

16 II. Analysis

17 Petitioner's claim that his counsel was ineffective as to the probation revocation is
18 based on his contention that when he was placed on probation in 2000, the term was five
19 years, with 297 days credit for time he had spent in jail prior to sentencing, not five years
20 *plus* the 297 days he had spent in jail. If it was the former, the term of probation had
21 expired before it was revoked; if the latter, he was still on probation when it was revoked.

22 Respondent contends that the 297 day term was a condition of probation, a
23 condition that the court found satisfied by time served at the time of sentencing, and thus
24 did not reduce the number of days to be served on probation.

25 The evidence is conflicting. The sentence imposed on March 3, 2000, pursuant to a
26 plea bargain is the source of the probation at issue. Pet., Ex. 2. It is recorded in a minute
27 order. The relevant portion of the order reads:

28 The Court having read and considered the report of the Probation Officer:
Imposition of sentence is suspended for a period of **Five (5) years** during

which time the defendant is placed under the care, custody and control of the Probation Officer of Alameda County, subject to the following terms and conditions, to-wit: Defendant shall:

[checkmarked box] Serve the first **297 days** of said probationary period in the Alameda County Jail with credit for time served: **297** Total days ([checkmarked box] actual **198** days + GT/WT **99** days; [checkmarked box] including GT/WT); and upon release therefrom; [checkmarked box] Report forthwith to the Probation Officer

Id. (emphasis in original).

At sentencing, the court said this in regard to the time petitioner had served in jail:

THE COURT: Imposition of sentence is suspended for five years. . . .

THE COURT: . . . you're subject to the standard conditions of probation

In addition to that, you're to serve 297 days in the Alameda County Jail.

You get credit for 198 actual, plus 99, for a total of 297 days. I just gave you time served. . . .

Those are the conditions.

Pet'r Ex. 6 (exhibits filed in support of traverse).

Respondent contends that petitioner's interpretation of the minute order – that he was being given credit for 297 days that should be deducted from his five-year probation – is “strained,” and that the sentence actually was a five-year period of probation, with a condition of probation that he serve an *additional* 297 days in jail, with credit of 297 days time served. Resp't P. & A. 7. The minute order, however, says that the 297 days are “of said probationary period,” and the words “probationary period” seem to refer back to the five years' probation imposed above the reference to the 297 day jail term. On the other hand, the quotation above from the sentencing hearing clearly shows that the court imposed a 297-day jail sentence that is *additional* to the five years of probation; that is, the courts used the words “in addition to that,” after imposing five years of probation and before saying that petitioner was required to serve 297 days in jail.

A lawyer need not file a motion that he or she knows to be meritless on the facts and the law. Trial counsel cannot have been ineffective for failing to raise a meritless motion.

Juan H. v. Allen, 408 F.3d 1262, 1273 (9th Cir. 2005); *Rupe v. Wood*, 93 F.3d 1434, 1445

(9th Cir. 1996); see, e.g., *Hebner v. McGrath*, 543 F.3d 1133, 1137 (9th Cir. 2008) (finding counsel's failure to object to admission of defendant's prior sexual misconduct as propensity evidence not ineffective where evidence would have been admitted in any event to show common plan or intent); *Lowry v. Lewis*, 21 F.3d at 346 (failure to file suppression motion not ineffective assistance where counsel investigated filing motion and no reasonable possibility evidence would have been suppressed). See also *Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999) (to show prejudice under *Strickland* from failure to file a motion, petitioner must show that (1) had his counsel filed the motion, it is reasonable that the trial court would have granted it as meritorious, and (2) had the motion been granted, it is reasonable that there would have been an outcome more favorable to him).

Under California law, an oral sentencing pronouncement by the judge controls over the ministerial record of the minutes. See *People v. Zackery*, 147 Cal. App. 4th 380, 385 (2007) ("Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls."); *People v. Wilshire Insurance Co.*, 67 Cal. App. 3d 521, 532-33 (1977). The consequence is that if petitioner's counsel had made the argument petitioner claims he should have, that petitioner was not still on probation when he committed the violation, that objection or motion would have been denied, because the oral pronouncement, which made the 297 days *additional* to the five-years probation, is controlling.

Counsel was not ineffective, so the rejections of the claim by the state appellate courts were not contrary to, or an unreasonable application of, clearly-established United States Supreme Court authority.

III. Appealability

The federal rules governing habeas cases brought by state prisoners have recently been amended to require a district court that denies a habeas petition to grant or deny a certificate of appealability in the ruling. See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009).

A petitioner may not appeal a final order in a federal habeas corpus proceeding

1 without first obtaining a certificate of appealability (formerly known as a certificate of
2 probable cause to appeal). See 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall
3 grant a certificate of appealability "only if the applicant has made a substantial showing of
4 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate
5 which issues satisfy this standard. See *id.* § 2253(c)(3). "Where a district court has
6 rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is
7 straightforward: the petitioner must demonstrate that reasonable jurists would find the
8 district court's assessment of the constitutional claims debatable or wrong." *Slack v.*
9 *McDaniel*, 120 S.Ct. 1595, 1604 (2000).

10 Because California law is clear that petitioner's counsel would not have succeeded
11 had he raised the issue petitioner says he should have, this was not a close case. For the
12 reasons set out above, jurists of reason would not find the result debatable or wrong. A
13 certificate of appealability will be denied. Petitioner is advised that he may not appeal the
14 denial of a COA, but he may ask the court of appeals to issue a COA under Rule 22 of the
15 Federal Rules of Appellate Procedure. See Rule 11(a), Rules Governing § 2254 Cases.

16 CONCLUSION

17 The petition for a writ of habeas corpus is **DENIED**. A Certificate of Appealability
18 also is **DENIED**. See Rule 11(a) of the Rules Governing Section 2254 Cases (eff. Dec. 1,
19 2009).

20 The clerk shall close the file.

21 **IT IS SO ORDERED.**

22 Dated: April 16, 2010.



23 PHYLLIS J. HAMILTON
24 United States District Judge

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